

programming.” The “Frequently Asked Questions” portion of its website similarly emphasizes this focus, and notes the subsidiary nature of the entertainment channels.

Q: What types of programs can I receive on Sky Angel?

A: If you thought you knew what was on Christian TV and radio from the handful of programs you may have seen or heard in the past, we know you will be pleasantly surprised to learn how much variety is really available in Christian programming today. More than you can imagine! On Sky Angel, you can channel surf through literally thousands of programs featuring all different ministry styles, program types and Christ-centered denominations. For a more detailed overview of the types of programs on Sky Angel’s Faith channels, [click here](#). While individuals and families are seeking a wide variety of faith-based TV and radio programming for their enrichment and enjoyment, we realize that they may be looking for quality wholesome entertainment, news and educational fare as well. Sky Angel has that too. We have hand-picked the best family entertainment, news and educational channels that mainstream television has to offer. For a more detailed overview of the types of programs on Sky Angel’s Family channels, [click here](#).

It is clear that Sky Angel considers its Family channels to be a secondary aspect of its service offering. Discovery is not included in Sky Angel’s 50-channel Faith TV gateway package, and Sky Angel will still be distributing over 70 channels of programming even without the Discovery channels. While Sky Angel’s subscribers undoubtedly enjoy Discovery’s programming, it is highly unlikely that they have elected to receive Sky Angel’s service in order to receive entertainment programming. Since the vast majority of Sky Angel’s service is faith-based programming, it is far more likely that subscribers have selected to receive programming from Sky Angel due to an interest in receiving such programming. Their ability to receive the mainstays of Sky Angel’s service will be unaffected by the loss of the Discovery networks.

Finally, Discovery gave Sky Angel three months’ notice of its intent to terminate the agreement, although it was under no contractual or other obligation to do so. Sky Angel has had months to notify its subscribers of this change in their service and secure replacement programming; if it has failed to do so, that harm is not caused by Discovery.

Since there is no evidence that the practice challenged as “unfair” in this matter has either the “purpose” or “effect” of harming Sky Angel, complainant’s section 628(b) claim should be dismissed for failure to state a claim.

#### IV. DISCOVERY HAS NOT ENGAGED IN UNLAWFUL DISCRIMINATION

Sky Angel’s Complaint fails to adequately allege – let alone establish – that Discovery’s decision to terminate the affiliation agreement is “discriminatory.” With respect to the practices alleged in the Complaint to be “discriminatory,” the simple truth is that Sky Angel is being treated no differently from any distributor of Discovery’s programming networks. It is not unlawfully discriminatory for Discovery to decline to allow Sky Angel to distribute its programming services in a manner that is not permitted for any other distributor of those services.

Under the program access rules, a claim of unlawful discrimination must be based upon differential treatment of similarly-situated competing distributors.<sup>69/</sup> As a threshold matter, Sky Angel’s discrimination claim must be rejected unless the Complaint demonstrates that Sky Angel competes with the distributor with which it seeks to be compared.<sup>70/</sup> It is by no means clear that the cable operators and DBS providers mentioned in the complaint even can be considered “competing distributors” with Sky Angel. Sky Angel presented itself to Discovery as a faith-based programming provider that was designed chiefly to supplement - rather than displace - MVPD service obtained by a video subscriber. Sky Angel’s web site states that:

We do not offer local channels and the majority of our customers only have one Sky Angel receiver that connects to their primary TV set. This information is important when

<sup>69/</sup> *First Program Access Order*, ¶¶ 98-99.

<sup>70/</sup> *See id.* ¶ 99; *Turner Vision, Inc., Satellite Receivers, Ltd., Consumer Satellite Systems, Inc., and Programmers Clearing House, Inc. v. CNN*, 13 FCC Rcd 12610 (1998), ¶ 18 (“*Consumer Satellite Systems v. CNN*”).

deciding if Sky Angel is simply going to be an added service to what you currently have or if it will replace your current TV service altogether.<sup>71/</sup>

Because the face of the Complaint fails to establish that Sky Angel competes with the DBS and cable operators with which it seeks to be compared, it should be dismissed.

But even if Sky Angel does compete with the MVPDs referenced in the Complaint, it cannot demonstrate that it is similarly situated with them. This case bears little resemblance to the archetypal non-price discrimination claim. Unlike the facts alleged by Sky Angel, the “usual ‘refusal to deal’ or ‘refusal to sell’ case” involves allegations that the program vendor flatly and irrevocably “refused to sell” or “refused to initiate discussions” with a distributor.<sup>72/</sup>

Here, by contrast, Discovery was willing to try to make an affiliation arrangement with Sky Angel work, so long as that arrangement could be carried out in accordance with business policies that Discovery applies to all MVPD affiliates.

No MVPD affiliate possesses the right to distribute Discovery’s programming networks in the manner undertaken by Sky Angel.

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<sup>71/</sup> [http://www.skyangel.com/About/faq/general\\_faq.aspx#/TEXT;splash=f;supportID=195](http://www.skyangel.com/About/faq/general_faq.aspx#/TEXT;splash=f;supportID=195).

<sup>72/</sup> *EchoStar Communications Corp. v. Speedvision Network, LLC; Outdoor Life Network, LLC*, 14 FCC Rcd 9327, 9337, ¶ 22 (1999).

<sup>73/</sup>

Sky Angel, however, allows its subscribers to access Discovery networks from multiple locations, not simply the location of their subscribing household.

Nothing in the Commission's rules requires Discovery to discriminate *in favor* of Sky Angel, and allow it to distribute Discovery's networks in ways that no other distributor can. But that is precisely the relief that Sky Angel seeks here. Because Sky Angel is not being deprived of a right afforded to any similarly situated MVPD affiliate of Discovery's – or any MVPD at all –, its discrimination claim must be dismissed.<sup>75/</sup>

The Complaint baldly asserts that Defendant has engaged in unlawful discrimination because it permits "far larger distributors to carry Discovery channels through Internet distribution. . . ."<sup>76/</sup> This assertion is flatly incorrect. While some specific shows featured on Discovery's programming services are available for distribution over the Internet, Discovery does not allow any MVPD to distribute any of Discovery's programming networks over the Internet.<sup>77/</sup> The mere fact that some individual shows carried on Discovery's networks are made available for viewing on the Internet can in no way be bootstrapped into an obligation to provide the entirety of Discovery's programming networks to any Internet-based distributor of programming. As with Sky Angel's claim of unfairness, a finding that Discovery's conduct was discriminatory would lead programmers to forego their ongoing experimentation with using the

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<sup>74/</sup>

<sup>75/</sup> See *Consumer Satellite Systems v. CNN*, ¶ 23.

<sup>76/</sup> Complaint at 11.

<sup>77/</sup> Kaminski Decl., ¶¶ 8, 30.

Internet as a form of distribution. As noted above, such an outcome is contrary to the Commission's policies of promoting growth in competition and broadband services.

**V. GRANTING THE RELIEF SOUGHT BY SKY ANGEL WOULD VIOLATE THE FIRST AMENDMENT**

The Commission may not compel Discovery to involuntarily continue providing its programming to Sky Angel without contravening the First Amendment. Cable programmers such as Discovery "engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment."<sup>78/</sup> While the D.C. Circuit has rejected a facial challenge to the program access rules, the Court specifically left open the issue of whether the rules as applied might burden or restrict speech more than is necessary and thereby fail the narrow tailoring requirement.<sup>79/</sup>

The compelled carriage sought by Sky Angel triggers strict scrutiny because it would force Discovery to speak in a manner not of its choosing.<sup>80/</sup> Under the strict scrutiny test applicable to such restrictions, the Commission would be required to demonstrate that the burden on speech serves a compelling governmental interest and is narrowly tailored to achieve that end.<sup>81/</sup> As a First Amendment speaker, Discovery has the right to present its speech in the environment and context it chooses. As made clear above,

<sup>78/</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"), citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

<sup>79/</sup> *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996).

<sup>80/</sup> *Riley*, 487 U.S. at 795 ("Mandating speech that a speaker would not otherwise make" is "content-based").

<sup>81/</sup> *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (to survive strict scrutiny, "the State must show that its regulation is necessary to serve a compelling state interest, and is narrowly drawn to achieve that end") (internal quotation marks omitted).

Thus, Discovery is compelled to speak in a context where it otherwise would refrain from doing so.<sup>83/</sup>

Even if the imposition of a forced sharing remedy in this case was examined under intermediate scrutiny, it would still fail to pass First Amendment muster. Burdens on cable programmers' protected speech are permissible only if they "further[] an important or substantial governmental interest" and are "no greater than is essential to the furtherance of that interest."<sup>84/</sup>

By reducing economic incentives to invest in the development of new programming, the result is "reduced programming -- that is, less speech."<sup>85/</sup> Such a restriction is permissible only if it addresses harms that are "real, not merely conjectural," and it "alleviate[s] these harms in a direct and material way."<sup>86/</sup>

The record here, however, is devoid of evidence suggesting that any non-speculative harm to consumers or competition would result from the loss of the Discovery services. Sky Angel has presented no empirical evidence specifically addressing the impact of the absence of

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<sup>82/</sup>

<sup>83/</sup> See *id.* at 8 ("[C]ompelled access . . . forces speakers to alter their speech to conform with an agenda they do not set.").

<sup>84/</sup> See *Turner I*, 512 U.S. at 662, quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>85/</sup> *Time Warner Entm't Co.*, 93 F.3d at 979.

<sup>86/</sup> *Turner I*, 512 U.S. at 664. See also *Time Warner II*, 240 F.3d at 1137.

the Discovery services from its line-up. The loss of the Discovery services has no impact on Sky Angel's ability to market itself as a family-friendly, faith-based video offering. Video consumers will continue to have a choice of multiple providers -- from cable, DBS, telcos and niche-based providers such as Sky Angel. Accordingly, the Complaint must be dismissed because the relief sought therein would contravene the First Amendment.

## **VI. RESPONSES TO NUMBERED PARAGRAPHS**

Pursuant to 47 C.F.R. § 76.7(b)(2)(iv), Defendants generally deny any allegation in the Complaint not specifically admitted below, and hereby respond to the particular allegations in Sky Angel's Complaint. Sky Angel has not numbered the paragraphs in its Complaint; therefore, Defendants treat the first paragraph in Section I.A. of the Complaint (the first paragraph on page one in the section titled "Sky Angel's Service") as paragraph one and state as follows with regard to that and each subsequent paragraph:

1. Deny that Sky Angel is an MVPD.
2. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.
3. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.
4. Deny that Discovery has taken any unexplained, unjustified, or anticompetitive action, or that Discovery has in any way threatened Sky Angel or its use of broadband.
5. State that the affiliation agreement speaks for itself and deny any other allegation or implication in this paragraph.
6. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above. Deny that any of the listed channels are "must have" channels.



7. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

8. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

9. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

10. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

11. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

12. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

13. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

14. Deny that any "Discovery channels" are being distributed over the Internet. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

15. Lack information to either admit or deny Sky Angel's assertions regarding the inner workings of its system. Deny any implication that any "Discovery channels" are being distributed over the Internet. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.



16. Deny all of Sky Angel's allegations and legal conclusions concerning the affiliation agreement, its terms, and Discovery's obligations thereunder. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

17. Deny this paragraph in its entirety.

18. State that the referenced document speaks for itself. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

19. State that the referenced document speaks for itself. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

20. Deny that Sky Angel is an MVPD. Deny that the Commission has jurisdiction over this matter, as Sky Angel is not an MVPD to which the program access rules apply. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

21. Deny that Sky Angel is an MVPD. Deny that the Commission has jurisdiction over this matter, as Sky Angel is not an MVPD to which the program access rules apply. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

22. State that the cited document speaks for itself. Deny that the Commission has jurisdiction over this matter, as Sky Angel is not an MVPD to which the program access rules apply.

23. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

24. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

25. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

26. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above. Deny that Discovery has refused to explain anything to Sky Angel. Deny that it is impossible for Sky Angel to address Discovery's concerns.

27. Deny Sky Angel's legal conclusions. Deny that Sky Angel is an MVPD. Deny that the Commission has jurisdiction over this matter, as Sky Angel is not an MVPD to which the program access rules apply. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

28. Deny Sky Angel's legal conclusions. Deny that Sky Angel is an MVPD. Deny that the Commission has jurisdiction over this matter, as Sky Angel is not an MVPD to which the program access rules apply. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

29. Deny that Discovery permits distribution of its channels over the Internet. Deny that Discovery is "attempting to crush" Sky Angel. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

30. Deny Sky Angel's legal conclusions. Deny that Sky Angel is an MVPD. Deny that the Commission has jurisdiction over this matter, as Sky Angel is not an MVPD to which the program access rules apply. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

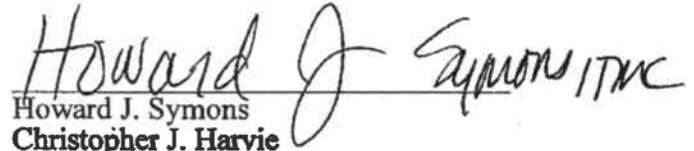
31. Deny this paragraph in its entirety.

32. Deny that this is the "real question." Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above.

**CONCLUSION**

**Sky Angel's Complaint should be dismissed.**

**Respectfully submitted,**

A handwritten signature in dark ink, appearing to read "Howard J. Symons". The signature is written over a horizontal line.

Howard J. Symons  
**Christopher J. Harvie**  
**Tara M. Corvo**  
Robert G. Kidwell  
MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY AND POPEO, P.C.  
701 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
(202) 434-7300

**April 21, 2010**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re the Matter of	)	
	)	
Complaint of SKY ANGEL U.S., LLC	)	
	)	File No. _____
Against Discovery Communications,	)	
LLC et al. for Violation of the	)	
Commission's Competitive Access	)	
to Cable Programming Rules	)	
	)	

**DECLARATION OF STEPHEN KAMINSKI**

I, Stephen Kaminski, declare as follows:

1. My title is Vice President, Legal Affairs. I have been with the company since February 2005. My duties include, among other things, negotiating and documenting affiliation and other agreements relating to Discovery Communications, LLC's programming networks.
2. I submit this declaration in response to the program access complaint filed on March 24, 2010 by Sky Angel U.S., LLC ("Sky Angel") against Discovery Communications, LLC and Animal Planet, LLC (collectively, "Discovery") pursuant to sections 76.1000- 76.1003 of the Commission's rules, 47 C.F.R. §§ 76.1000-76.1003.
3. I have personally participated in discussions with Sky Angel representatives regarding the Discovery programming services carried by Sky Angel.

**Negotiation of the Sky Angel Agreement**

4. In approximately the fall of 2007, representatives of Sky Angel approached Discovery with an idea for a new video offering. They stated Sky Angel was creating a "family friendly" video offering that would include only a few select networks. The offering would be marketed as a limited service that families could use as a supplement to a family's regular

MVPD service, if the family wanted, for example, to limit the video content on a "family television set" to networks that were appropriate for all ages. Sky Angel wanted to include some of Discovery's programming networks in this new offering.

5. Discovery wants its content to be as widely available as possible, and uses multiple platforms to make its content widely available. It is open to allowing carriage of its programming networks on new technologies and over new services, provided that it has the rights to enter into such arrangements. Discovery was among the first programmers to enter into affiliation agreements with Verizon, AT&T and their respective predecessors, and has entered into hundreds of deals with small telephone companies.

6.

7.

8.

9. In our negotiations, Sky Angel emphasized that its service was similar to a traditional cable service, in that it was a fixed service that would be restricted to delivering video content to television sets in subscribers' homes. Neither Mr. Scott nor anyone else at Sky Angel ever mentioned that its service would be marketed as available anywhere there is an Internet connection. Had anyone from Sky Angel ever advised of the transportable, multilocation nature of its service, we would have immediately ceased discussions for distribution of our programming networks.

10.

11.

12.



14. Discovery signed the agreement with Sky Angel on October 16, 2007.

**Concerns About Sky Angel's Distribution System**

15. Sky-Angel carried our programming networks during 2008 and 2009.
16. In late 2009, we became aware that Sky Angel was running a very aggressive marketing campaign that clearly promoted its service as an Internet-based, transportable service that could be used in multiple locations.
17. We reviewed Sky Angel's website and discovered that while Sky Angel's service can be viewed on a television set in the home, it is not a fixed service tied to a single subscriber address, but can be used in multiple locations wherever there is an Internet connection.
18. Sky Angel's current website, <http://www.skyangel.com/home/Default.aspx#>, asserts that Sky Angel is "revolutionary television that can be viewed on your TV or PC." It also states that:

A high-speed Internet connection is required wherever the Sky Angel service is going to be used. The recommended Internet speed is 1.5 Mbps or greater. Sky Angel works with Cable broadband and Telco DSL Internet services only. If you travel with Sky Angel, you must have approved access to the hardwired or wireless Internet and may be subject to usage caps.

[http://www.skyangel.com/about/faq/general\\_faq.aspx#/TEXT:splash=f;supportID=192](http://www.skyangel.com/about/faq/general_faq.aspx#/TEXT:splash=f;supportID=192).

19. The Sky Angel website also contains the following question and answer in its "Frequently Asked Questions" section:

Q: Can I take Sky Angel receiver back and forth to my second home and when I travel?

A: Yes, as long as you have high-speed Internet access at your home and it meets the minimum speed requirement of 1.5 Mbps. When traveling, all you have to do is connect the receiver to a high-speed modem using Ethernet cable or find and use the authorized wireless network. The Sky Angel receiver is small and compact and great

for bringing your favorite Sky Angel TV or radio channels along with you while traveling.

[http://www.skyangel.com/about/faq/general\\_faq.aspx#/TEXT:splash=f;supportID=204](http://www.skyangel.com/about/faq/general_faq.aspx#/TEXT:splash=f;supportID=204)

20.

**Decision to Terminate Sky Angel**

21.

22.

23.

24.

25.

26. To the extent Mr. Collins is suggesting that I stated the decision to terminate the Sky Angel agreement was "recent," that is true.

27. Contrary to Mr. Collins' assertion (Collins Decl. ¶¶ 9-10), in response to Mr. Collins' question about the difference between Sky Angel and what we authorize for Comcast and Time Warner, I specifically told him that we have authorized distribution of only a small subset of programs on the Internet on a trial basis. I do not recall saying that "Comcast and Time Warner have 30 million subscribers." *Id.* Indeed, mentioning that fact would not have been relevant, because as described in more detail below, neither Comcast nor Time Warner (nor any other distributor) has the right to distribute our programming networks over the Internet as part of a transportable, multi-location television service.

28. As a courtesy to its distributors, Discovery has occasionally agreed to allow certain pieces of content (*i.e.*, specific programs) to be made available to the distributors' subscribers on the Internet. Discovery may also make certain of its programs available on its own website, or on other Internet sites. In each of these very limited number of cases, these programs are carefully selected to ensure that Discovery has the rights to allow such Internet distribution of the program.

29. Mr. Collins' assertion (Collins Decl. ¶ 10) that "Discovery is permitting the same programming content distributed by Sky Angel to be delivered directly through the Internet to the computers of Comcast and Time Warner subscribers" is false (*see* discussion *infra* at ¶¶ 34-38).

30. I do not recall telling Mr. Collins in response to a question asking "why Discovery is attempting to hinder the use of the IP technology utilized by Sky Angel" that "Comcast and Time Warner have 30 million customers." Collins Decl. ¶ 10. Nor would I have said so, because many of Discovery's distributors use or are planning to use IP technology to deliver our programming networks to subscribers. Those distributors, however, deliver the networks over a closed, secure system to subscriber homes. They do not offer a transportable service that a single subscriber can access in multiple locations over an Internet connection.

31.

32. Although Mr. Collins states that he "asked" me whether Discovery "wanted major groups like the Parents Television Counsel [sic] and conservative organizations coming after Discovery and voicing their displeasure" with Discovery's decision to terminate the agreement, Collins Decl. ¶ 11, in fact, what Mr. Collins did was threaten to mobilize all advocacy groups with whom Sky Angel has contacts in protest against Discovery. I did not respond to this threat.

33. Following these conversations, on January 22, 2010, we sent Sky Angel a letter terminating the agreement. Although we were not required to do so pursuant to the agreement,

we provided them with three months' notice in order to allow them sufficient time to notify their subscribers.

**Discovery's Concerns About Internet Distribution**

34. Although many of our distributors have expressed an interest in Internet distribution of our networks, Discovery has steadfastly refused to enter into any such agreements.

35.


36. In addition, Discovery has determined that at this time, Internet distribution of its programming may not be a sound business plan.

37. The belief that Internet distribution would not be a strong business model for Discovery is held by all levels of Discovery leadership. Many of Discovery's top executives have been very public about their belief that if Discovery's programming were available over the Internet, the long-term net effect would be a serious decline in Discovery's ability to produce high-quality programming.

38. For all of these reasons, Discovery has not entered into any distribution arrangement with any MVPD or other service provider for distribution of its programming networks on the Internet as part of a transportable, multilocation television service.

I solemnly affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

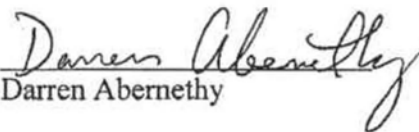
Date: 4/21/14

  
\_\_\_\_\_  
Stephen Kaminski

## **CERTIFICATE OF SERVICE**

I, Darren Abernethy, do hereby certify that on this 21st day of April, 2010, a true and correct copy of the foregoing **ANSWER TO PROGRAM ACCESS COMPLAINT** was served by first class mail, postage prepaid, on the following:

Charles R. Naftalin  
Leighton T. Brown II  
Holland & Knight LLP  
2099 Pennsylvania Ave., N.W.  
Suite 100  
Washington, D.C. 20006

  
Darren Abernethy